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No. 85-729 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLARD A. BRONGER, ET AL., PETITIONERS

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' military service should be credited in determining whether they completed the requisite 25 years of service as air traffic controllers in order to be eligible for early retirement under 5 U.S.C. 8336(e).

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-9a) is reported at 769 F.2d 756, and the panel opinion (Pet. App. 10a-27a) is reported at 740 F.2d 1552.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on August 1, 1985, and the petition for a writ of certiorari was filed on October 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) called a nationwide strike of air traffic controllers employed by the Federal Aviation Administration (FAA) in the Department of Transportation. The FAA took steps to remove controllers who were

strike participants, but those controllers who were eligible for retirement were given the option of retiring rather than facing disciplinary proceedings. At that time, each of the three petitioners in this case was under 50 years of age, had approximately 23 years of service in civilian air traffic controller positions with the FAA, and had approximately three years of prior military service, apparently performing a similar type of work. Pet. App. 4a.

Each petitioner filed an application for early retirement pursuant to 5 U.S.C. 8336(e), which provides:

> (e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.

The Office of Personnel Management (OPM) denied the applications (Pet. App. 45a-53a), and the Merit Systems Protection Board (MSPB) affirmed (*id.* at 28a-44a). The MSPB held that petitioners were not eligible for early retirement because their discharges as a result of the strike activities constituted "removal for cause on charges of misconduct or delinquency" within the meaning of 5 U.S.C. 8336(e). The MSPB therefore did not reach OPM's argument that petitioners' military service should not be counted for purposes of determining their eligibility for early retirement benefits and that petitioners therefore did not have the requisite "25 years of service as an air traffic controller" (Pet. App. 30a-31a, 36a-37a, 42a-43a).

Petitioners then sought review of the MSPB decisions in the United States Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. 7703 and 28 U.S.C. 1295(a)(9). A divided panel of the court of appeals reversed the MSPB's

decisions, holding that petitioners' military service should be counted in determining their eligibility for early retirement (Pet. App. 10a-27a).[1] However, on rehearing en banc, the court of appeals affirmed the MSPB's decisions sustaining OPM's denial of petitioners' applications for retirement benefits (*id.* at 1a-9a).[2] The en banc court concluded that 5 U.S.C. 8336(e) requires 25 years of civilian service as an air traffic controller, that petitioners' military service therefore must be excluded, and that, as a result, petitioners were not eligible for early retirement.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Review by this Court therefore is not warranted.

1. Petitioners' claim of entitlement to civil service retirement benefits is refuted by the terms of the relevant statutory provisions. Under 5 U.S.C. 8336(e), an employee who is under age 50 is entitled to a retirement annuity "after completing 25 years of service as an air traffic controller * * *." The term "air traffic controller" is defined in 5 U.S.C. 2109(1) as "an *employee* of the Department of Transportation or the Department of Defense who * * * is actively engaged in the separation and control of air traffic"

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[1]In the court of appeals, OPM abandoned the argument that petitioners were ineligible for benefits as a result of their discharge for strike activities. OPM took that position because, as a matter of administrative discretion, petitioners would have been given the option of retiring rather than being discharged for cause if their military service could be included in their years of service. Pet. App. 13a-14a & n.3.

[2]The court of appeals at first stayed proceedings on OPM's petition for rehearing, pending this Court's decision in *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985). After the Court held in *Lindahl* that the Federal Circuit has jurisdiction of appeals from MSPB decisions in civil service retirement cases, the court of appeals vacated that stay and granted rehearing en banc on the merits. Pet. App. 3a.

(emphasis added). The term "employee" is defined in 5 U.S.C. 2105(a) to mean an individual "appointed in the *civil service*" (emphasis added), and the term "civil service" is defined in 5 U.S.C. 2101 expressly to exclude positions in the armed forces and other uniformed services. Because the term "air traffic controller" is defined by these statutory provisions to mean only a civilian employee, the phrase "25 years of service as an air traffic controller" in 5 U.S.C. 8336(e) necessarily encompasses only civilian service and does not include petitioners' military service.

Petitioners attempt to avoid this conclusion by relying on selected portions of the language of 5 U.S.C. 8336(e). Thus, petitioners argue that Section 8336(e) requires only 25 years of "service," and they point out that the term "service" is defined as a general matter for purposes of the civil service retirement program to include certain military service as well as civilian service. See 5 U.S.C. 8331(12) and 8332(c). The difficulty with this argument is that 5 U.S.C. 8336(e) requires not merely 25 years of "service," but specifically 25 years of "service *as an air traffic controller*" (emphasis added). As we have explained, the emphasized phrase is expressly defined to include only civilian service. The general definition of the term "service" for other purposes does not override this specific limitation in the statutory provision under which petitioners seek benefits.

2. The legislative history of the enactment of 5 U.S.C. 8336(e) in 1972[3] confirms the conclusion compelled by the statutory text: that Congress did not contemplate the inclusion of military service. The Senate Report states (S. Rep. 92-774, 92d Cong., 2d Sess. 3 (1972)):

> The average controller enters the service in his early twenties, often after military service, and by the time he is qualified as a journeyman controller, is near 30. If he

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[3]Pub. L. No. 92-297, § 5, 86 Stat. 144.

> entered the FAA at age 25, he would have to complete 30 years of service before becoming eligible for retirement.[4]

It is apparent that the "service" Congress had in mind and intended to credit in 5 U.S.C 8336(e) was that which commences upon "enter[ing] the FAA," often "after military service." As the court of appeals correctly concluded (Pet. App. 6a):

> If Congress had intended that military service in a position comparable to civilian air traffic controller be counted as "years of service" toward early retirement, one would expect that Congress would have provided either a limitation in § 8332(c) on the type of military service to be counted or would have specified in § 8336(e) to include time in the military as an "air traffic controller" within "years of service." Congress did neither.

3. Finally, as the court of appeals observed, "the statutory interpretation of § 8336(e) given by OPM has been consistent since enactment in 1972 and is also consistent with its interpretation of the paralliel provision in § 8336(c)," which provides early retirement benefits for federal law enforcement officers. Pet. App. 8a; see *id.* at 7a-8a. Substantial weight should be given to this interpretation by the agency charged with administration of the statute. See, *e.g.*, *Connecticut Department of Income Maintenance* v. *Heckler*, No. 83-2136 (May 20, 1985), slip op. 6-8; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-372 (1973).

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[4]The reference is to 5 U.S.C. 8336(a), the standard retirement provision, which states that an employee must be 55 years of age and complete 30 years of service in order to be eligible for an annuity.

Thus, petitioners' submission is inconsistent with all of the relevant indicia of congressional intent—the text of the statutory provision, its legislative history, and the consistent administrative interpretation. This question of statutory construction, on which the agency charged with administering the statute and the court charged with reviewing its decisions are in agreement, does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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